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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 WILLIAM BOGAN,

12 Plaintiff,

13 v.

14 NANCY A. BERRYHILL, Acting
15 Social Security Commissioner,¹

16 Defendant.

Case No. CV 15-5981-DFM

MEMORANDUM ORDER AND
OPINION

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18 Plaintiff William Bogan (“Bogan”) appeals from the Social Security
19 Commissioner’s final decision denying his application for disability insurance
20 benefits. The Court concludes that the Administrative Law Judge (“ALJ”) did
21 not err in relying on the testimony of a vocational expert (“VE”) to find that
22 Bogan could perform other work available in the national economy. The
23 Commissioner’s decision is therefore affirmed and the matter dismissed with
24 prejudice.

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26 ¹ On January 21, 2017, Berryhill became the Acting Social Security
27 Commissioner. Thus, she is automatically substituted as defendant under
28 Federal Rule of Civil Procedure 25(d).

I.

BACKGROUND

Bogan applied for disability insurance benefits in June 2011, alleging that he became unable to work because of disability on June 1, 2010.

Administrative Record (“AR”) 272-73. The Commissioner denied Bogan’s application. AR 131-35. Bogan requested a hearing; hearings took place on December 11, 2012, July 10, 2013, and February 3, 2014. AR 136, 33-121.

The ALJ concluded that Bogan was not disabled under the Social Security Act. AR 16-32. Applying the five-step sequential evaluation process, the ALJ found at step one that Bogan had not engaged in substantial gainful activity after June 1, 2010. AR 21. At step two, the ALJ found that Bogan had severe impairments of degenerative disc disease, cervical disc disease, status post right shoulder rotator cuff repair with residual pain, and obesity. AR 22. At step three, the ALJ determined that Bogan did not have a listed impairment. Id. The ALJ also found that Bogan had the residual functional capacity (“RFC”) to perform a limited range of light work. Of relevance here, the ALJ found that Bogan was “precluded from reaching overhead with the right arm, but [could] occasionally reach in other directions” and had “no [such] restrictions on the left arm.” Id.

After concluding that Bogan was unable to perform his past relevant work, the ALJ found—based on the VE’s testimony—that Bogan could perform alternative jobs existing in significant numbers in the national economy. AR 26-28. These jobs were fundraiser, survey worker, and information clerk. Id.

II.

ISSUE PRESENTED

The parties present one issue: whether the ALJ properly determined that Bogan could perform the alternative work as a fundraiser, survey worker, and

1 information clerk, given the reaching restrictions on his right arm. See Joint
2 Stipulation (“JS”) at 5-22.²

3 III.

4 STANDARD OF REVIEW

5 Under 42 U.S.C. § 405(g), a district court may review the
6 Commissioner’s decision to deny benefits. The ALJ’s findings and decision
7 should be upheld if they are free from legal error and supported by substantial
8 evidence based on the record as a whole. Parra v. Astrue, 481 F.3d 742, 746
9 (9th Cir. 2007). Substantial evidence means such relevant evidence as a
10 reasonable person might accept as adequate to support a conclusion.
11 Richardson v. Perales, 402 U.S. 389, 401 (1971); Lingenfelter v. Astrue, 504
12 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less than a
13 preponderance. Lingenfelter, 504 F.3d at 1035. To determine whether
14 substantial evidence supports a finding, the reviewing court “must review the
15 administrative record as a whole, weighing both the evidence that supports and
16 the evidence that detracts from the Commissioner’s conclusion.” Reddick v.
17 Chater, 157 F.3d 715, 720 (9th Cir. 1998). “If the evidence can reasonably
18 support either affirming or reversing,” the reviewing court “may not substitute
19 its judgment” for that of the Commissioner. Id. at 720-21.

20 IV.

21 DISCUSSION

22 A. Relevant Proceedings

23 At the third hearing, the ALJ asked the VE whether work existed in the
24 national economy for an individual with Bogan’s RFC—including the fact that
25 with his dominant right arm, he could not reach overhead at all, but could
26 occasionally reach in all other directions. AR 52-53. The VE identified three

27 ² Citations to the Joint Stipulation use the CM/ECF pagination.
28

1 jobs: (1) fundraiser II (Dictionary of Occupational Titles (“DOT”) 293.357-
2 014), (2) survey worker (DOT 205.367-054), and (3) information clerk (DOT
3 237.367-018). AR 54.

4 The following exchange then took place:

5 [Plaintiff’s Attorney:] [I]f we take the same hypothetical that
6 you just had . . . and describe the reaching as no substantial ability
7 on the right in all directions, not just overhead – if we change that
8 on the dominant, would it allow for the performance of the work
9 you’ve identified?

10 [VE:] No. . . . I’m just running through all the – the DOT
11 titles here looking for reaching requirements, and it looks to be
12 that they all have at least frequent reaching here at the – frequent
13 or constant at the light level.

14 . . .

15 ALJ: This is only with one arm – this is only with one arm
16 though.

17 VE: Right.

18 ALJ: So are we’re talking about, essentially, a one-arm
19 person –

20 VE: Um –

21 ALJ: – but only has the use of his non-dominant –

22 VE: Oh, okay. I didn’t understand. So inability to reach in
23 all directions but with only one extremity?

24 ALJ: With the right arm – am I – I don’t mean to put words
25 in your mouth. Is that what you said?

26 [Plaintiff’s Attorney:] Right. I’ve taken [the hypothetical]
27 which included – with respect to the dominant – there was no limit
28 on reaching at all on the left, if I remember correctly.

1 VE: Mm-hmm.

2 [Plaintiff's Attorney:] But with respect to the right, dominant
3 arm, the original [hypothetical] had no reaching overhead –

4 VE: Mm-hmm.

5 [Plaintiff's Attorney:] – but all other directions occasional.

6 VE: Okay.

7 [Plaintiff's Attorney:] And so I'm simply applying all other
8 directions, whether that's out front to any degree or overhead,
9 reducing that to essentially zero.

10 VE: Right.

11 [Plaintiff's Attorney:] So we have –

12 ALJ: I think I understand the hypothetical. Basically, we
13 have a one-arm person with a non-dominant –

14 VE: It's clear now, yes. . . . Then it wouldn't affect the jobs
15 that I identified if the left upper extremity were not limited.

16 ALJ: Even if it's non-dominant?

17 VE: That is correct.

18 ALJ: Okay.

19 [Plaintiff's Attorney:] Okay.

20 AR 54-56.

21 In his decision, the ALJ discussed the VE's testimony that Bogan could
22 perform the identified jobs despite his limitations. AR 27-28. The ALJ also
23 noted that, "[p]ursuant to SSR 00-4p, the undersigned has determined that the
24 vocational expert's testimony is consistent with the information contained in
25 the [DOT]." AR 28. Based on the VE's testimony, the ALJ determined that
26 Bogan was "capable of making a successful adjustment to other work that
27 exists in significant numbers in the national economy." Id. The ALJ therefore
28 found that Bogan was not disabled. Id.

1 **B. Law**

2 At step five of the sequential evaluation process, the Commissioner must
 3 demonstrate that the claimant can perform work that exists in “significant
 4 numbers” in the national or regional economy, taking into account the
 5 claimant’s RFC, age, education, and work experience. Tackett v. Apfel, 180
 6 F.3d 1094, 1100-01 (9th Cir. 1999); 20 C.F.R. § 404.1560(c). In making a
 7 disability determination, the DOT is the primary source for “information about
 8 the requirements of work in the national economy.” Massachi v. Astrue, 486
 9 F.3d 1149, 1153 (9th Cir. 2007) (citing SSR 00-4p, 2000 WL 1898704, at *2
 10 (Dec. 4, 2000)). The ALJ may also use VE testimony to obtain occupational
 11 evidence. Id.

12 When a VE’s testimony presents an “apparent or obvious” conflict with
 13 a DOT occupation, the ALJ “must elicit a reasonable explanation for the
 14 conflict before relying on the [expert’s] evidence to support a determination or
 15 decision about whether the claimant is disabled.” SSR 00-4p, 2000 WL
 16 1898704, at *2; Gutierrez v. Colvin, 844 F.3d 804, 807 (9th Cir. 2016). Failure
 17 to perform this step is procedural error. Massachi, 486 F.3d at 1153-54 & n.19.
 18 The Court may find the error harmless if the VE provided sufficient support for
 19 his conclusion that justified any potential conflicts. Id. at 1154 n.19.

20 **C. Analysis**

21 According to the DOT, the jobs of fundraiser II (DOT 293.357-014),
 22 survey worker (DOT 205.367-054), and information clerk (DOT 237.367-018),
 23 all require frequent reaching. Although the job descriptions do not specify
 24 whether this reaching is bilateral, the Social Security Administration defines
 25 reaching as “extending the hands and arms in any direction.” SSR 85-15, 1985
 26 WL 56857, at *7 (Jan. 1, 1985) (emphasis added). Bogan argues that the ALJ
 27 failed to resolve conflicts between the DOT and the right-arm reaching
 28 limitation. JS at 7-15.

1 As the Ninth Circuit recently held, “not all potential conflicts between a
 2 [VE’s] job suitability recommendation” and the DOT’s job description “will be
 3 apparent or obvious,” and the ALJ “need only follow up on those that are.”
 4 Gutierrez, 844 F.3d at 807-08. Accordingly, “[f]or a difference between an
 5 expert’s testimony and the [DOT] to be fairly characterized as a conflict, it
 6 must be obvious and apparent.” Id. at 808. “This means that the testimony
 7 must be at odds with the [DOT’s description] of job requirements that are
 8 essential, integral, or expected.” Id. “[T]asks that aren’t essential, integral, or
 9 expected parts of a job are less likely to qualify as apparent conflicts that the
 10 ALJ must ask about.” Id.

11 Accordingly, the ALJ “must ask follow up questions of a vocational
 12 expert when the expert’s testimony is either obviously or apparently contrary
 13 to the [DOT], but the obligation doesn’t extend to unlikely situations or
 14 circumstances.” Id. Thus, “where the frequency or necessity of a [job’s] task is
 15 unlikely and unforeseeable . . . there’s no [such] obligation.” Id.

16 Here, the DOT defines the jobs identified by the VE as follows:

- 17 • Fundraiser II: “Contacts individuals and firms to solicit donations for
 18 charity or other causes: Confers with supervisor, or reads potential donor
 19 list, to determine which individuals or firms to approach. Contacts
 20 individuals and firms by telephone, in person, or by mail to solicit funds
 21 or gifts-in-kind. Takes pledges for amounts or gifts-in-kind to be
 22 contributed, or accepts immediate cash payments. May sell emblems or
 23 other tokens of organization represented. May write letter to express
 24 appreciation for donation. May arrange for pick-up of gifts-in-kind.”
 25 DOT 293.357.014, 1991 WL 672578.
- 26 • Survey Worker: “Interviews people and compiles statistical information
 27 on topics, such as public issues or consumer buying habits: Contacts
 28 people at home or place of business, or approaches persons at random on

1 street, or contacts them by telephone, following specified sampling
 2 procedures. Asks questions following specified outline on questionnaire
 3 and records answers. Reviews, classifies, and sorts questionnaires
 4 following specified procedures and criteria. May participate in federal,
 5 state, or local population survey and be known as Census Enumerator
 6 (government ser.).” DOT 205.367-054, 1991 WL 671725.

- 7 • Information Clerk: “Provides travel information for bus or train patrons:
 8 Answers inquiries regarding departures, arrivals, stops, and destinations
 9 of scheduled buses or trains. Describes routes, services, and
 10 accommodations available. Furnishes patrons with timetables and travel
 11 literature. Computes and quotes rates for interline trips, group tours, and
 12 special discounts for children and military personnel, using rate tables.”
 13 DOT 237.367-018, 1991 WL 672187.

14 From these descriptions, it is neither obvious nor apparent that the essential,
 15 integral, or expected job requirements of any of these jobs would include
 16 overhead reaching. As the Ninth Circuit in Gutierrez noted, “[t]he requirement
 17 for an ALJ to ask follow up questions is fact-dependent.” Id. Here, the VE
 18 identified three jobs that Bogan could perform despite his limitations. Absent
 19 an obvious or apparent conflict, the ALJ was entitled to rely on the VE’s
 20 “experience in job placement” to account for “a particular job’s requirements,”
 21 SSR 00-4p, 2000 WL 1898704, at *2, and correctly did so here. Remand is not
 22 warranted.

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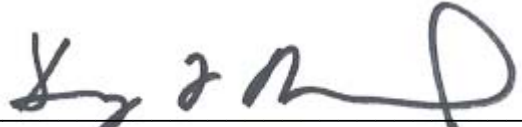
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V.

CONCLUSION

For the reasons stated above, the decision of the Social Security Commissioner is AFFIRMED and the action is DISMISSED with prejudice.

Dated: February 13, 2017



DOUGLAS F. McCORMICK
United States Magistrate Judge